upon its own facts and upon the character and antecedents of the offender."

The effect of the observation as far as I can see is that the court must ponder very seriously and be extremely hesitant before imposing corporal punishment in cases not involving violence or brutality. The court must consider not only the facts of each case but also the character and antecedents of the offender. In this appeal the antecedents of the appellant with his record of previous convictions are very much against him. But the antecedents of the offender or the fact that he is a habitual thief cannot be made the sole consideration for inflicting the punishment of whipping. The facts of the case against him should also be considered. In my opinion facts envisaged by the above quoted case must be such as to show circumstances so aggravating as to repulse human conscience. In the case here the facts merely showed that the police arrested the appellant while he was riding a bicycle which the complainant had reported four days earlier to have been stolen from him. I can see nothing in these facts which justify the court to exercise its discretion of imposing the punishment of whipping.

I therefore alter the order of the learned magistrate and set aside the sentence as regards whipping.

Order accordingly.

NG MOH v. TAN BOK KIM & ANOR.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) & MacIntyre F.J.) August 27, 1968]

[K.L. — Federal Court Civil Appeal No. X 92 of 1967]

Limitation — Claim for recovery of possession of land — Defence pleading limitation — Accrual of cause of action — Limitation Ordinance, 1953.

Land — Claim for recovery of — Limitation — Accrual of cause of action.

The respondents brought an action for the recovery of possession from the appellant of a piece of land in Kuala Lumpur of which they were registered as proprietors. They alleged that the appellant was in unlawful occupation of the land in question and had built houses thereon without their knowledge and consent. The appellant denied that he was in unlawful occupation and alleged that he was in possession under a sale agreement dated December 30, 1950 between himself and one *L* as administratrix and counterclaimed for specific performance.

The learned trial judge held that the counterclaim was barred by limitation in that 12 years had elapsed between the date of the agreement and the date of the counterclaim, (September 16, 1965).

Held, allowing the appeal: the cause of action accrued on *L's* failure to take the necessary action under clause 2 of the agreement after the lapse of 14 days from the date of a letter Exhibit D.8 and not from the date of the agreement. The failure to initiate the necessary action was the first clear unequivocal threat to infringe the appellant's right. In the circumstances the appellant's counterclaim filed on September 16, 1965 was within time.

Case referred to:—

(1) *Bolo* v. *Koklan & Ors.* L.R. 57 I.A. 325; A.I.R. 1930 P.C. 270.

FEDERAL COURT.

V. Oorjitham for the appellant.

T.C. Tang for the respondents.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Kuala Lumpur in which the appellant was the defendant. The respondents as the plaintiffs claimed for the return of a certain piece of land from the appellant on the ground that the land belonged to the estate of Tan Pung Chong deceased and that they were the administrators *de bonis non.*

The appellant counterclaimed that the land had been sold to him by Lim Pheng, the previous administratrix of the said estate, under an agreement dated 30th December 1950, Exhibit D.5, signed by them and prayed for specific performance of the agreement.

The land at the time of the agreement was an undivided 80/409th share in Lot No. 3683 in the Mukim of Batu, Kuala Lumpur and subsequently on 31st December 1965 after partition became an entry in the Mukim register No. 6713 for lot 4719. Under the agreement Lim Pheng as administratrix of the said estate agreed to sell the said land to the appellant for $3,600 of which $2,600 was paid immediately and the balance of $1,000 was to be paid on the effectual transfer of the land to the appellant or his nominee. The agreement also provided that Lim Pheng should proceed to apply to the court to cause a valid document of transfer to be executed in favour of the appellant or his nominee and that the appellant should be given immediate possession and it gave him discretion to erect any building on the land and occupy it.

According to the appellant, he went into possession and erected several houses on it, but during the state of emergency subsisting in the State he was ordered by the authorities to remove from that land and the buildings thereon.

The appellant wrote through his solicitor on 15th April 1955 to Lim Pheng requesting her to immediately carry out her part of the bargain namely to obtain an order of the court for the transfer of the said land to him. There was no reply to that letter. Again on 31st March 1964 the appellant through his solicitor wrote to one Tan Boon Seng requesting to know when the sale transaction could be completed. Tan Boon Seng is apparently a son of both Lim Pheng and the deceased and was a witness to the agree-

ment D.5. No reply to that letter was received by the appellant.

On 14th April 1965 the appellant entered into an agreement with a building contractor for the erection of four houses on the land at an agreed price of $27,800.

On 22nd April 1965, the respondents through their solicitor wrote a letter to the appellant pointing out that he had unlawfully erected the buildings on their land without their knowledge or consent and requesting him to demolish and remove the same.

As I have stated the action brought by the respondents was for recovery of possession from the appellant of the land in question of which they have become registered proprietors as representatives, upon the allegation that the appellant was in unlawful occupation of the land and had built houses thereon without their knowledge and consent. The appellant denied that he was in unlawful occupation. His contention being that he was in possession of the land and had erected buildings on it under the sale agreement between himself and Lim Pheng as administratrix and that he was counterclaiming for specific performance of that agreement.

In the defence to the counterclaim the respondents said that it was barred by the Limitation Ordinance 1953.

The learned judge held that the appellant was given possession of the said land in pursuance of the agreement in question and that he had retained possession ever since.

The learned judge, however, finally dismissed the counterclaim on the ground that it was barred by limitation, in that 12 years had elapsed between the date of the agreement (30th December 1950) and the date of the counterclaim (16th September 1965). Both counsel conceded that this being an action for recovery of land the period of limitation was 12 years.

There are several grounds of appeal but the substantial question we have been asked to decide is when the right of action by the appellant accrued, namely whether it was the date of agreement as held by the judge or the date of the letter Exhibit D.8 as urged by counsel for the appellant.

In *Bolo* v. *Koklan & Ors.*[1] one of the questions the Privy Council had to decide was as to when the right to sue accrues, for the purpose of article 120 in Schedule I of the Indian Limitation Act (IX of 1908).

The judgment of the Privy Council at page 331 has this to say:—

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

In the present case clause 2 of the agreement D.5 says this:—

"The vendor (i.e. Lim Pheng) shall proceed to apply to the court for permission to cause a valid document of transfer to be executed in favour of the purchaser or his nominee for the effectual transfer of the said land to the purchaser (the appellant) or his nominee."

In my view, the cause of action in this case accrued on Lim Pheng's failure to take the necessary action under clause 2 of the agreement after the lapse of 14 days from the date of the letter D.8. This failure to initiate the necessary action appeared to me the first clear unequivocal threat to infringe appellant's right. That date would be 30th April 1955 and in the circumstances therefore, the appellant's counterclaim filed on 16th September 1965 would be within time.

I would therefore allow the appeal, set aside the judgment of the court below and direct that the respondents transfer the land in question to the appellant on payment of $1,000 by the appellant to the respondents. The respondents will pay the costs of this appeal and also costs in the court below.

Pike C.J. (Borneo) and **MacIntyre F.J.** concurred.

Appeal allowed.

Solicitors: *Oorjitham & Lam; T.C. Tang & Co.*

FOO SAY LEE v. OOI HENG WAI

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & MacIntyre F.J.) August 29, 1968]

[Kota Bharu—Federal Court Civil Appeal No. X37 of 1968]

Land Laws — Malay reservation — Transfer of land from Malay reservation to non-Malay — Transfer subject to approval of State government and Ruler in Council — Whether void — Malay Reservations Enactment, 1930, ss. 7, 12 & 13A(i).

On August 19, 1958 the plaintiff entered into an agreement with the defendant for the purchase of a piece of land in Kota Bharu. On signing the agreement the plaintiff paid the defendant $1,500 and the balance of $3,500 was to be paid on the transfer of the land to the plaintiff. At the date of the agreement the land was held by a Malay. Condition 3 of the agreement provided that the sale was subject to the approval of the Kelantan government and the Ruler in Council. At the date of the writ the title of the land had been registered in the name of the defendant.

At the hearing in the court below the preliminary point was raised as to whether the said agreement was null and void under the Malay Reservations Enactment, 1930. The learned judge ruled that it was not null and void as it was an agreement to sell subject to the approval of the Kelantan government and the Ruler in Council. On appeal,

Held, dismissing the appeal: (1) only attempts to deal in reservation land contrary to the provisions of the enactment would be null and void. Although the agreement between the parties could be regarded as an